FILED
OCT 20 1982
ALEXANDER L. STEVAS,
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NO. 82-520

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JEROME G. BEERY,

Petitioner,

-against-

DAN E. TURNER,

Respondent.

SUPPLEMENTAL PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JEROME G. BEERY, PRO SE
565 Navajo
Los Alamos, New Mexico
87544
(505)-667-5355

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UNITED STATES DISTRICT COURT

DISTRICT OF KANSAS

JEROME G. BEERY, Bankrupt,

DAN E. TURNER, Trustee,

vs. Case 76-39-B5

JEROME G. BEERY, Defendant

ORDER

The above-captioned case came before the Court for evidentiary hearing on September 12, 1977. The Court having heard the evidence of the parties allowed each side fifteen days within which to file any supplementary suggestions. The parties having complied, the issue stands ready for resolution. The Court now makes the following findings:

FINDINGS OF FACT

1. The alleged bankrupt, Jerome G. Beery, filed a Chapter XI petition in Bankruptcy January 16, 1976 (subsequent to the imposition of state receivership January 5, 1976), styling himself Jerome G. Beery d/b/a Jerome G. Beery, Brownville Grain Co., and Mayer-Gelbort-Leslie. An amended petition filed February 17, 1976, deleted the reference to Mayer-Gelbort-Leslie. Mr. Dan Turner was appointed trustee.

2. No debtor's schedules and statements of affairs were timely filed as required by the Rules of Bankruptcy.

3. On April 15, 1976, a hearing was held before the Hon. Robert B. Morton, Bankruptcy Judge, at which the Chapter XI proceeding was converted into a "straight bankruptcy" proceeding, as provided for in 11 U.S.C. 776(2) and 778. Mr. Dan Turner

was to continue in his capacity as Trustee. This oral order was memorialized in Judge Morton's written order of April 20, 1976.

4. Mr. Beery subsequently interposed a motion to reconsider this adjudication of bankruptcy on the ground he was a "farmer" as defined in 11 U.S.C. 1(17) on January 16, 1976, and thus could not have been made an involuntary bankrupt under 11 U.S.C. 22(b).

5. On August 5, 1977, this Court ordered a partial withdrawal of the case to this Court for a de novo hearing on the issue whether Mr. Beery was indeed a "farmer" on the date in question.

6. The evidence disclosed Mr. Beery may have farmed several leased tracts formerly owned by him (six or seven quarters of 160 acres each) in the years 1974 and 1975. In addition, he was in the business of buying and selling grain as"Brownville Grain Co." in Colby, Kansas, and owned and

ran the Colby office of Mayer-Gelbort-Leslie, a commodities investment firm.

7. Mr. Beery did not maintain detailed accounts of income and expenses which would allow accrual-basis accounting or reconstruction of the exact state and nature of his various enterprises.

8. Mr. Beery maintained several bank accounts for his personal and business use, and commingled the funds of his various enterprises.

9. A partial reconstruction of Mr. Beery's financial transactions was accomplished by Messrs. B. Eugene Criss and Richard D. Miller, Certified Public Accountants with considerable expertise in agricultural accounting, from check stubs and partial records found in the Brownville Grain office after the state receivership was imposed.

10. These reconstructed records, and in particular plaintiff's exhibit 30, indicate the cash flow through Brownville

vastly exceeded that of the farming operation for the year 1974, even though Brownville Grain was in operation for only five months in 1974. The Brownville Grain business showed a profit while the farming operations were operated at a loss.

11. In 1975, the farm enterprise again lost large amounts due to substantial operating expenses. The Brownville Grain business experienced a total cash flow of over seven million dollars. Profit or loss attributable to the grain business is impossible to ascertain with accuracy since Brownville Grain accounts were"tapped" for other purposes, including farm operation, personal expenses and commodities investment, since many of the Brownville Grain contracts provided for payment to farmers after the 1975 calendar year, and since the validity of over four million dollars in creditors' claims from unpaid grain contracts has yet to be adjudicated.

12. If all creditors' claims are held valid, Mr. Beery's various enterprises lost over one and one-half million dollars in 1975.

13. The farming operation of Mr. Beery could not have "paid its own way" and would have collapsed had it not been for the Brownville Grain funds used to keep it going.

14. Brownville Grain Co. owned no storage facilities and no record of payment for storage has been found. The Brownville Grain operation consisted chiefly of "paper transfers" of grain, and its operating overhead was quite low. The principal debts incurred by Mr. Beery, as represented by the claims of creditors filed in this proceeding, were incurred in the operation of Brownville Grain Co.

15. Mr. Beery lost substantial sums in commodities speculation; some of these funds were generated by Brownville Grain operations. Not all of these commodities

transactions may be explained as "hedging" against markets dealing in the same commodities as did Brownville Grain.

16. The various reconstructed accounts cover the calendar years 1974 and 1975.

CONCLUSIONS OF LAW

1. In order to qualify as a "farmer" so as to be exempt from involuntary bankruptcy, one must be "personally engaged in farming or tillage of the soil," and "the principal part of his income" must be "derived from . . . such operations." 11 U.S.C. 1(17).

2. If Mr. Beery was indeed a "farmer" within the above definition, he could not have been adjudicated a bankrupt without his consent, and this Court should dismiss the involuntary bankruptcy proceedings. 11 U.S.C. 42(b).

3. Cases concerning the right to farmer-debtor relief proceedings under

former 11 U.S.C. 203, see Anno. 3 ALR 2d 544, are wholly inapplicable to the question before us. Cases decided under the pre-1938 version of 11 U.S.C. 1(17), and the criteria applied in those cases, may be of persuasive value today in a close case although they are not binding interpretations. In re Schoenburg, 279 F.2d 806, 809 (5th Cir. 1960), cert. den. 364 U.S. 923, reh. den. 364 U.S. 944 (1961).

4. A person engaged in an agriculturally-related business who also owns or operates a farm or farms is not a farmer unless his principal income comes from his personal farming operations, In re Hinrichs, 314 F.2d 384 (7th Cir. 1963); In re Schoenburg, supra; 1 Remington on Bankruptcy No. 70 (5th ed. 1950).

5. In determining "principal source of income" for purposes of 11 U.S.C. 1(17), the Court must refer to the alleged bankrupt's principal source of attempted or gross income, since if a net income or

profit could be shown the debtor would not be insolvent. 1 Remington on Bankruptcy No. 70, p. 131 (5th ed. 1950).

6. In the present case it is clear Mr. Beery's principal attempt to make income did not involve his farming operations, but rather focused upon his grain and commodities dealings. His farming operations, extensive as they have have been, pale into insignificance when viewed in the context of his overall business pursuits. Also, large sums of money were diverted from Brownville Grain into commodities investments; while this may result in no gross profit for Brownville Grain for the year 1975 when all claims are adjudicated, such questionable transactions still have no bearing on the issue of Mr. Beery's personal engagement in farming.

7. The burden of proof rests upon the trustee, as representative of the creditors, to prove Mr. Beery was not a "farmer" and hence is subject to

involuntary bankruptcy proceedings. In re White, 238 F. Supp. 454, 455 (D. Colo. 1965). See also In re Hinrichs, supra. We hold this burden has been met. Mr. Beery's principal business was the sale of grain "other . . . than that of his own raising." Schoenburg, supra at 809. "The exemption was not intended as a refuge for a debtor whose farming is only an incident of other business, whose principal debts were incurred in operating such other ventures and whose principal income was not derived from farming." Id. at 810.

At trial Mr. Beery objected thrice to the use of reconstructed records submitted as plaintiff's exhibit 30 on the ground they are unaudited and incomplete. We do not find this to be a valid cause for objection. Mr. Criss testifed at length as to the state of the records available, and stated that a complete and audited report

may never be a possibility. It is true these accounts are in many places based upon conjecture, since the accountants were unable to trace thousands of dollars and hundreds of individual transactions. Yet there was ample evidence that the difficulty in compiling such accounts, and their often conjectural nature, stems from the wholly inadequate record-keeping of Mr. Beery and his complete failure to cooperate with the Trustee as this matter is litigated. Mr. Beery cannot be heard to complaining of impediments he alone created.

Mr. Beery also asserts that the reports, which concern his business dealings only up to December 31, 1975, are not probative of his status on January 16, 1976. Yet in closing argument Mr. Beery himself asked the Court to consider his financial history because "an instantaneous determination cannot be made." There is ample evidence that many of the farmers with whom Mr. Beery dealt in Brownville Grain

transactions preferred to defer payment until after December 31 for tax purposes, and that the failure of Mr. Beery to discharge such obligations led to the imposition of the state receivership on January 5, 1976. At the time of the filing of the Chapter XI petition on January 16, 1976, which removed Mr. Beery's assets from the state receivership into the jurisdiction of the bankruptcy court, it is technically possible to say Mr. Beery had no business operations at all. We are convinced that, had not the collapse of his financial empire and subsequent judicial proceedings intervened, Mr. Beery could still not have been found to be a "farmer" on January 16. The evidence weighs overwhelmingly against him, and presents a classic case of an entrepreneur who tried, and failed, to make his fortune using the funds of others. The "farmer" exemption was never intended to protect

such individuals from involuntary adjudications of bankruptcy. See In re Beechwood, 42 F. Supp. 401, 403 (D.N.J. 1942).

WHEREFORE, the motion for reconsideration of Judge Morton's orders of April 15 and 20, 1976, adjudicating Jerome G. Beery an involuntary bankrupt, is OVERRULED. The case will proceed.

IT IS SO ORDERED.

Dated this 5th day of October, 1977, at Topeka, Kansas.

/s/ RICHARD D. ROGERS
United States District Judge

JOURNAL ENTRY OF JUDGMENT

NOW on this 31st day of October, 1977, the above-entitled matter comes on for hearing before the Court, the plaintiff appearing by and through its attorney Dan E. Turner and defendant appears pro se.

THEREUPON, the Court having heard the evidence, arguments, and statements of counsel, and the Court after due deliberation rendered its decision and on the 5th day of October, 1977, made and filed its Findings of Fact, Conclusions of Law and Order that defendant's motion for reconsideration of Judge Morton's orders of April 15 and 20, 1976, adjudicating Jerome G. Beery an involuntary bankrupt be overruled and defendant's bankruptcy should proceed.

NOW, THEREFORE, PURSUANT THERETO, IT IS DETERMINED BY THE COURT the Order be entered as it may be necessary to comply with Fed. R. Civ. P. 58.

/s/ Richard D. Rogers

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

In Re: JEROME G. BEERY, d/b/a Brownville Grain
Bankruptcy No. 76-39-B5

ORDER

The above-captioned case comes before the Court upon the appeal of bankrupt Jerome G. Beery from the order of the Bankruptcy Court entered October 21, 1977, denying bankrupt's requests for jury trial on the issues of involvency, commission of an act of bankruptcy, and withdrawal of the Chapter XI proceeding filed January 16, 1976. We believe the reasoning of the bankruptcy court as reflected in the October 21 order was correct.

The right to jury trial in a bankruptcy proceeding is not derived from the Seventh Amendment, but is a purely statutory matter. Diamond Door Co. v. Lane-

Stanton Lumber Co., 505 F.2d 1199 (9th Cir. 1974); In re Thomas, 211 F. Supp. 187 (D. Colo. 1962), aff'd., 327 F.2d 667 (10th Cir. 1964), cert. den., 379 U.S. 827. The right to jury is thus completely a creature of statute. 11 U.S.C. 42 grants the right to jury trial only to "a person against whom an involuntary petition has been filed" and then only on the issues of insolvency and commission of an act of bankruptcy. Bankrupt's act of filing a sworn Chapter XI petition and allleging therein that he was "unable to pay his debts as they mature," must be considered, as a matter of law, an admission of insolvency and an act of bankruptcy in itself. Cf. Wynne v. Rochelle, 385 F.2d 789 (5th Cir. 1967). That bankrupt's unsuccessful "arrangement" was converted to an adjudication of "straight" bankruptcy, while perhaps "involuntary" from the bankrupt's point of view, does not

thereby bring him within the provisions of 11 U.S.C. 42. An adjudication of bankruptcy entered pursuant to 11 U.S.C. 776 has the technical effect of creating a "voluntary" bankruptcy. 11 U.S.C. 778(a)(2). "[A] debtor who files under Chapter XI has placed himself in the same category as if he had filed a voluntary petition in bankruptcy," has admitted all issues otherwise triable by jury, and cannot avail himself of the jury trial provisions of 11 U.S.C. 42. In re Trans-Pacific Corporation, 76 F. Supp. 623 (S.D. Cal. 1947), aff'd, 166 F.2c 1021 (9th Cir. 1948), cert. den., 335 U.S. 515.

The order of the bankruptcy court is therefore affirmed in all respects.

IT IS SO ORDERED.

Dated this 3rd day of March, 1978, at Topeka, Kansas.

/s/ RICHARD D. ROGERS
United States District Judge

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